IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 77-1554

COUNTY COURT, ULSTER COUNTY, NEW YORK; WOODBOURNE CORRECTIONAL FACILITY, WOODBOURNE, NEW YORK,

Petitioners,

-against-

SAMUEL ALLEN, RAYMOND HARDRICK and MELVIN LEMMONS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

MICHAEL YOUNG
GOLDBERGER, FELDMAN & DUBIN
Attorneys for Respondents
401 Broadway, Suite 306
New York, New York 10013
(212) 431-9380

Dick Bailey Printers, 290 Richmond Ave., Staten Island, N.Y. 10302
Tel.: (212) 447-5358

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BRIEF FOR RESPONDENTS

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondents Samuel Allen, Raymond Hardrick and Melvin Lemmons submit this brief in opposition to petitioner's application for a writ of certiorari.

STATEMENT OF THE CASE

On March 28, 1973, Samuel Allen, Raymond Hardrick and Melvin Lemmons, the respondents herein, and one "Jane Doe", a sixteen year old girl, were riding in an automobile on the New York State Thruway. Respondents Lemmons was driving, with "Jane Doe" sitting in the right front seat; respondents Allen and Hadrdrick were in the back seat. When the car was stopped for a speeding violation,[1] one of the officers approached the right (passenger) side of the vehicle. Looking through the right front window, he could see Doe's handbag lying on the floor of the vehicle between Doe's right leg and the car door next to her. Protruding from the top of the bag was the handle of a gun. A search of the bag disclosed a second gun and various documents belonging to Doe. When questioned by the officers, Doe admitted that the handbag was hers.

A. THE TRIAL

Respondents Lemmons, Allen and Hardrick, together with Doe, were subsequently all charged, tried and convicted of possession of these two guns.[2] Except for the evidence that the guns were found inside Doe's purse in the car in which respondents and Doe were riding, the State introduced no evidence that any of the respondents had actual or constructive possession or even knowledge of the existence of the guns. Rather, the State relied on the statutory presumption of possession set forth in New York Penal Law §265.15(3):

> The presence in an automobile . . . of any firearm . . . is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon . . . is found . . .

As the State concedes,[3] this statutory presumption provided the only possible basis for respondents' convictions.

At the close of the State's case, the respondents moved to dismiss the gun charges, claiming, *inter alia,* that the presumption could not properly be applied to them and that absent the presumption, there was no evidence on which the jury could return a guilty verdict. The trial court denied respondents' motion.

Respondents also argued, during the colloquy on the dismissal motion, that the "on-the-person" exception to the statutory presumption was applicable to this case. The trial court expressly rejected that argument at that time, and consequently, omitted any reference to the "on-the-person" exception when it thereafter charged the jury as to the presumption.[4]

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1. When the officers called in Lemmons' driver's license identification, they were advised that he was wanted on a fugitive warrant from Michigan, and he was arrested by the officers on that basis. It was later learned that the information concerning a fugitive warrant was inaccurate, and that there was no such warrant for Lemmons at the time of his arrest.

2. Respondents and Doe were also charged, tried and acquitted for possession of drugs and a gun allegedly found in the trunk of the car in which they were riding.

3. See *e.g.*, district court opinion at 2 (set forth in petitioner's appendix at 34a.

4. The Court's charge on the presumption was as follows: Our Penal Law also provides that the presence in an automobile of any machine gun or of any handgun or firearm which is loaded is presumptive evidence of their unlawful possession.

In other words, these presumptions or this latter presumption upon proof of the presence of the machine gun and the hand weapons, you may infer and draw a conclusion that such prohibited weapon was possessed by each of the defendants who occupied the automobile at the time when such instruments were found. The presumption or presumptions is effective only so long as there is no substantial evidence contradicting the conclusion flowing from the presumption, and the presumption is said to disappear when such contradictory evidence is adduced.

After conviction, respondents moved to set aside the verdict, again on the ground that since the statutory presumption could not properly apply to them, there was insufficient evidence to sustain the jury's verdict. The trial court also denied this motion.

B. THE STATE APPEALS

The state appellate courts affirmed respondents' convictions over strongly worded dissents. In respondents' brief to the New York Appellate Division, Third Department, the respondents raised a series of related arguments going to the impropriety of the statutory presumption and the insuffiency of evidence to sustain their convictions. Thus, they argued (1) that the presumption was unconstitutional;[5] (2) that the facts here brought respondents within the "on-the-person" exception to the statutory presumption; and (3) that the evidence presented at trial was "totally insufficient to sustain the conviction."

The appellate division affirmed by a vote of three to two. The majority wrote no opinion; the dissenting judges accepted respondents' argument (denominated (2) above) that as a matter of law, the "on-the-person" exception to the statutory presumption was controlling in this case, rendering the presumption inapplicable and the remaining evidence insufficient to sustain the convictions. *People v. Lemmons, et al.*, 49 A.D.2d 639 (3d Dept. 1975).

Respondents thereafter raised the same issues in the New York Court of Appeals. The majority in that Court,

5. The New York Court of Appeals had previously held that the presumption was constitutional on its face *(People v. DeLeon*, 32 N.Y.2d 944 (1973); *People v. Russo*, 303 N.Y. 673 (1951)). Consequently, respondents assumed for purposes of state appeal that these cases were controlling as to facial constitutionality. After stating that assumption and citing to *DeLeon*, respondents went on to argue that the presumption was unconstitutional as applied in this case.

while acknowledging that the constitutionality of the statutory presumption had been raised in the parties' briefs (*People v. Lemmons*, 40 N.Y.2d 505 (1976), petitioner's appendix at 37a, 39a-40a), did not expressly address that issue. However, the majority's adherence to its earlier decisions upholding the constitutionality of the presumption was implicit in its comment that the presumption was valid because of the difficulty of proving possession of guns found in automobiles, and the importance of facilitating prosecutions for possession of such weapons (*id.*, petitioners' appendix at 43a-45a).

The majority found that respondents' second claim — that the "on-the-person" exception to the statutory presumption was controlling here — was a factual issue for the jury which respondents had waived by failing to object to the judge's omission of that exception from his instructions to the jury.

The dissenting judges held that the "on-the-person" exception was controlling here. They also found that the statutory presumption was unconstitutional as applied in this case because the conclusion that respondents possessed the weapons in question did not rationally flow from the mere presence of those guns in Doe's purse (*id.*, petitioners' appendix at 51a).

C. THE FEDERAL COURT PROCEEDINGS

Respondents next filed an application pursuant to 28 U.S.C. §2254 in the District Court for the Southern District of New York. In the application, respondents argued, *inter alia*, (1) that the "on-the-person" exception to the statutory presumption rendered it inapplicable to the respondents, (2) that the presumption was unconstitutional on its face, (3) that it was unconstitutional as applied in this case, and (4) that respondents were convicted on less than proof beyond a reasonable doubt.

The District Court, in granting respondents' application, found the presumption unconstitutional as applied because the inference that respondents all possessed the guns did not naturally flow from the mere discovery of those guns in Doe's handbag. Consequently, the district court found that the trial court erred in failing to grant respondents' motion to dismiss the charges at the conclusion of the State's case.[6]

The Second Circuit Court of Appeals unanimously affirmed the granting of respondents' habeas corpus application. A majority of the panel did so on the ground that the statutory presumption was facially unconstitutional. The third judge concurred in the result, but on the ground that the statutory presumption was unconstitutional as applied in this case.

Petitioners' request for *en banc* reconsideration of the panel's decision was denied without dissent.

6. Because of its disposition, the district court found it unnecessary to determine another issue raised by respondents in the petition—that the trial court had committed constitutional error by failing to charge the jury as to the "on-the-person" exception to the statutory presumption. The district court did note, however, that in light of respondents' repeated arguments as to the inapplicability of the presumption on precisely this ground, their failure to object to this omission in the charge did not constitute a deliberate by-pass of state procedures as to that issue.

REASONS WHY THE APPLICATION FOR A WRIT SHOULD BE DENIED

POINT I

THE PETITIONERS' SUBSTANTIVE CLAIMS (POINT I OF PETITIONERS' BRIEF) FAIL TO STATE AN ACTUAL CONTROVERSY; THE SECOND CIRCUIT DID NOT ERR IN AFFIRMING THE GRANT OF RESPONDENTS' HABEAS CORPUS APPLICATION.

Point I of Petitioners' brief fails to state any "actual controversy" which would justify the granting of their certiorari petition. (United States Constitution, Article III; *cf. Steffel* v. *Thompson,* 415 U.S. 452, 458 (1974); *Roe* v. *Wade,* 410 U.S. 113, 125 (1973); *Environmental Protection Agency,* _____U.S._____ 97 S.Ct. 1635 (1977); *Stickel* v. *United States,* 76 S.Ct. 1067 (1956). At no point in this argument do the petitioners claim that respondents were properly convicted, or that the relief granted by the Second Circuit — affirmance of the district court's issuance of a writ of habeas corpus — was error.

Nor would such an argument be valid if it had been made. The conviction of the three respondents for jointly possessing two guns, based upon a showing only that respondents were traveling in the same car as a woman in whose purse the guns were found, was clearly unconstitutional. *Leary* v. *United States,* 195 U.S. 6 (1969); see also *Vachon* v. *New Hampshire*, 414 U.S. 478 (1974).

Thus, petitioners do not argue that the Second Circuit's affirmance in this case should be set aside. Rather, they only claim that the finding of facial unconstitutionality on which the Second Circuit majority based its decision was "broader than is required . . .", and should have been limited instead to a finding that the statutory

presumption in question was unconstitutional as applied in this case. (Petitioners' brief at 9.) In fact, petitioners cite with approval the concurring opinion in the court below which affirmed the grant of habeas corpus relief on the latter ground. (Petitioners' brief at 9.)

Respondents submit that the finding of facial unconstitutionality is proper and justified. (See Points IA-C, *infra*.) Even if the Court were to agree with every argument petitioners advance in Point I of their brief, however, respondents would still be entitled to the relief they have been granted, on the ground that the statutory presumption is unconstitutional as applied in this case. This is not a case in which enforcement of a state statute was enjoined by a federal court (compare *Steffel* v. Thompson, supra). Rather, it was the grant of an isolated habeas corpus application. Since the facial constitutionality issue which petitioners raise in Point I would not affect the relief granted to respondents, the parties lack the personal interest in the outcome which is requisite to an "actual controversy." Rather, the arguments advanced by petitioners are purely hypothetical as to this proceeding.

Indeed, it may be unnecessary for the Court ever to pass on the facial constitutionality issue raised by the petitioners. As the Second Circuit noted in its opinion in this case (petitioners' appendix at 25a), the state courts have failed to date to apply the *Leary* test[7] in judging the constitutionality of this statutory presumption. Rather, they relied on the earlier test of prosecutorial convenience articulated in *Morrison* v. *California,* 291 U.S. 82 (1934). That test is no longer good law, having been reduced to a "corollary" in *Tot* v. *United States*, 319 U.S. 463 (1943), and finally disgarded altogether in *Leary* in favor of the "more likely than not" test. *United States* v. *Leary, supra,* 395 U.S. at 34-36. Hopefully, the state courts, aided now

7. *Leary v. United States,* 395 U.S. 6 (1969).

by the Second Circuit's articulation of the proper test, will concur with that court's conclusion that the presumption in question is facially unconstitutional, thereby obviating the need for the Court to involve itself in this dispute.

Even if the state courts continue to maintain that the statute is facially constitutional, however, the State is, at the very least, obliged to refrain from seeking the Court's consideration of that issue until a lower federal court either enjoins application of the statute or grants habeas corpus relief to a defendant who the State can claim was properly convicted under this statute. Absent such prerequisites, there is no "actual controversy" in this case, and the petition for a writ of certiorari should be denied.

-A-

In Point IA of their brief, petitioners argue that a writ of certiorari should issue because of the conflict between the Second Circuit and the New York Court of Appeals over the facial constitutionality of this statutory presumption. Respondents submit that the fact that these two courts are presently in disagreement on this issue does not make it necessary for the Court to take up this case.

The question of the facial constitutionality of New York Penal Law §265.15(3) is too limited in scope to justify entering this case on the Court's already overcrowded calendar. Petitioners appear to concede that a decision by the Court on this issue would affect, at most, this single New York State statute and perhaps a few other closely related New York statutory presumptions. They cite to no other state's statutes, or conflicts between the Second Circuit's decision and other state or federal court decisions, which would be affected by the Court's involvement in this case.

Given the parochial nature of this issue, the New York State courts should resolve this conflict themselves.

As noted above, the state courts have heretofore failed to apply the proper test in judging the constitutionality of this presumption. They should be given an opportunity to do so now, with the benefit of the Second Circuit's findings on the issue, before the State insists that the Court intervene.

Moreover, the mere fact that the New York Court of Appeals disagrees with the Second Circuit's resolution of this issue provides no more justification for review by the Court than would a conflict between a court of appeals and a lower court over which the former had direct appellate review. With all due respect for the current debate over whether the Supremacy Clause of the United States Constitution vests the lower federal courts with *de jure* appellate jurisdiction over the state courts on questions of Constitutional law,[8] the inescapable fact is that the United States Constitution and Congress conferred such jurisdiction on the federal courts *de facto* by providing them with habeas corpus, injunctive and declaratory judgment powers over state proceedings. United States Constitution, Art. I, Sec. 9, cl. 2; 28 U.S.C. §§1253, 1331, 1343, 2201, 2202, 2281, 2241, 2254; 42 U.S.C. §1983. Thus, irregardless of whether the New York State courts are legally bound to follow the Second Circuit's finding that this presumption is facially unconstitutional, they would be acting at their peril if they failed to do so, since any defendant whose conviction was obtained through employment of this statute would be entitled to relief in the federal courts. By conferring this authority on the federal courts, the Constitutional framers and Congress clearly intended that the federal courts' decisions on con-

8. Compare *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072 (7th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971); *State v. Coleman*, 46 N.J. 16, 214 A.2d 393, (1965); *Iowa National Bank v. Stewart*, 214 Iowa 1229, 232 N.W. 445 (1930) with *Handy v. Goodyear Tire & Rubber Co.*, 230 Ala. 211, 160 So. 530 (1935); *Kuchenmeister v. Los Angeles & S.L.R.*, 52 Utah 116, 172 P. 725 (1918).

stitutional matters should be controlling over the state courts. The Second Circuit's exercise of that authority does not require that this Court grant certiorari in this case, particularly since the Second Circuit's decision on the issue is clearly correct (see Point IC, *infra*).

-B-

Petitioners' second argument (Point IB of petitioners' brief) is that the Second Circuit violated policies of judicial restraint by holding the statutory presumption in question to be facially unconstitutional when that Court could have limited itself to holding that the statute was unconstitutional as applied in this case. Although such restraint is appropriate where a litigant against whom a statute has been properly applied seeks to raise the constitutional rights of others by claiming that the statute is unconstitutionally overbroad (see *e.g.*, *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)) or in certain other litigatory contexts, it is not applicable to the present case. Here, petitioners appear to concede, as they must, that the statutory presumption in question was unconstitutional as applied to the respondents. In such circumstances, the courts are empowered, and indeed obliged, to consider the facial constitutionality of the challenged statute. See *e.g.*, *Turner* v. *United States*, 396 U.S. 398 (1970); *Leary* v. *United States, supra; Tot v. United States*, 319 U.S. 463 (1943); *United States v. Romano*, 392 U.S. 136 (1965); *United States v. Gainey*, 380 U.S. 63 (1965).

The policy which the petitioners advance in this portion of their brief would preclude any court from ever deciding the facial constitutionality of any statute. For this reason, the arguments as to judicial economy, so prevalent in other portions of petitioners' brief, are notably absent here. Confining courts to an "as applied" analysis of even the most blatantly unconstitutional statutes would ob-

viously result in a substantial and totally unnecessary proliferation of litigation. To date, the courts have repeatedly demonstrated their ability to distinguish between those statutes which are unconstitutional on their face, and those in which the holding should be limited to a finding of unconstitutionality as applied. See *e.g., United States v. Gonzalez,* 442 F.2d 698 (2d Cir.) (*en banc*), *cert. denied, sub nom. Ovalle v. United States,* 404 U.S. 845 (1971). Divesting them of that discretion would serve only to substantially increase the caseload of an already overburdened judicial system.'

C

Petitioners' claim that the statutory presumption in question is constitutional on its face (Petitioners' brief at IC) centers primarily on an argument that the Second Circuit improperly substituted its judgment for the "judgment of the legislature in determining the rationality of the relationship between the proved fact and the presumed fact . . ." (Petitioners' brief at 11). Although petitioners provide a lengthy analysis of the legislative history of this statutory presumption, they fail to cite a single instance where the New York legislature even suggested that the conclusion that an individual possessed a weapon rationally flowed from the mere fact that he or she was riding in an

9. The fact that the Court has dismissed direct appeals challenging the constitutionality of other New York statutory presumptions (Petitioners' brief at 10-11) is of no consequence to this proceeding. None of those appeals involved the statutory presumption in question here. Moreover, a dismissal "for want of a substantial federal question" does not constitute a finding that the challenged statute was constitutional. Rather, such a ruling may be based on any one of a variety of considerations, such as the appellant's failure properly to preserve the issue (see *e.g., Cardinale v. Louisiana,* 394 U.S. 437, 439 (1969). As such, it is a finding only that the appellant in that particular case was not entitled to relief.

automobile in which that weapon was found. To the contrary, as the Second Circuit found after researching this issue, the history of this legislation establishes that this presumption was encoded solely because of the difficulty of securing convictions without it. (See the Second Circuit opinion, petitioners' appendix at 23a). Ironically, prosecutors were unable to convince either the juries or the courts that possession could rationally be inferred from mere presence. See *e.g., People v. Lemmons,* 40 N.Y.2d at 509-11, set forth in petitioners' appendix at 43a; *People ex rel. DeFeo v. Warden,* 136 Misc. 836, 241 N.Y.S. 63. Thus, the legislature's principal motivation for enacting this provision is in fact indicative of its unconstitutionality.

After recognizing this fact, the Second Circuit properly proceeded, as the Court did in cases such as *Leary v. United States, supra,* 395 U.S. at 37-54, to make its own determination as to the presumption's empirical validity (Second Circuit opinion, petitioners' appendix at 20a-30a). That analysis led the court to the conclusion that the question of whether a defendant possessed a weapon turned not merely on proof of presence but rather "on a variety of circumstances and on the largely unpredictable combinations in which they occur." (*Id.,* petitioners' appendix at 27a). Consequently, the court correctly concluded that this presumption, which treated presence alone as dispositive, was unconstitutional.[10]

In defense of the presumption, petitioners describe what they apparently believe to be the factual setting in which an inference of possession would most rationally flow from proof of mere presence—"when loaded large

10. Applying this same reasoning, a federal district court for the Southern District of New York has subsequently invalidated New York Penal Law §220.25(1), which made presence of a controlled substance in an automobile presumptive evidence of knowing possession by all of the car's occupants. *Lopez v. Curry,* 78 Civ. 653.

calibre firearms are on open display in an automobile occupied by more than one person." (Petitioners' brief at 13). Of course, the presumption is not drawn so as to apply only in such circumstances. Moreover, even in the factual setting which petitioners describe, a wide variety of factors other than mere presence, including, *inter alia,* the number of passengers in the car, their relationship to one another, their reasons for being in the car, the size and construction of the vehicle, the location of the weapons, the location of the passengers, the fingerprints on the weapons, the other items in the car, the conduct of the occupants, etc., would all be relevant to the question of whether possession was inferable as to one or more of the passengers. The impossibility of incorporating such unlimited variables into a statutory presumption (Second Circuit opinion, petitioners' appendix at 27a-30a), and the impropriety of imposing on a defendant the burden of disproving an inference of possession based on a statutory presumption which fails to incorporate such variables *(cf. Mullaney v. Wilbur,* 421 U.S. 684, 701 (1975)), are precisely why the statute in question is facially unconstitutional.

POINT II

RESPONDENTS DID NOT WAIVE THEIR RIGHT TO HABEAS CORPUS RELIEF EITHER BY FAILING TO OBJECT TO THE JURY CHARGE OR BY FAILING TO APPEAL DIRECTLY TO THE COURT FROM THE NEW YORK COURT OF APPEALS.

A

Respondents argued the unconstitutionality of the challenged presumption—as well as the related issue that the proof at trial was unconstitutionally deficient absent the presumption—in their motion for a directed verdict at the end of the government's case, their motion to set aside the verdict, their brief to the Appellate Division, and their brief to the New York Court of Appeals. The Second Circuit so found (Second Circuit opinion, petitioners' appendix at 10a, fn. 9),[11] and petitioners do not contest the accuracy of that finding in their brief to the Court.

Petitioners claim, however, that respondents

11. The Second Circuit found that the respondents argued that the presumption was unconstitutional "as applied" on each of these occasions. The court assumed that facial constitutionality was not separately raised, but found respondents' repeated arguments that the presumption was unconstitutional as applied to be sufficient to preserve the facial constitutionality issue (Second Circuit opinion, petitioners' appendix at 9a-15a). Respondents additionally submit that the issue of facial constitutionality was proper for federal review since the state's highest court had previously ruled on it (see *People v. DeLeon,* 32 N.Y.2d 944 (1973); *People v. Russo,* 303 N.Y. 673 (1951)), a fact which respondents expressly noted at each stage of the state trial and appellate proceedings. Where the highest court in a state has specifically held that a statute is facially constitutional, a subsequent litigant is not obliged to fruitlessly reargue its unconstitutionality merely to preserve the issue for federal review. See *e.g., Stubbs v. Smith,* 433 F.2d 64, 69 (2d Cir. 1976); *United States ex rel. Schaedel v. Follette,* 447 F.2d 1297, 1299-1301 (2d Cir. 1971); *cf. Picard v. Connor,* 404 U.S. 270, 275 (1971); *Wilwording v. Swenson,* 404 U.S. 249, 250 (1971); *Brown v. Allen,* 344 U.S. 443, 448-49 n. 3 (1953).

nonetheless waived their right to challenge the constitutionality of this presumption in the federal courts by failing to object to the omission of any reference to the "on-the-person" exception to the presumption in the judge's charge to the jury. This argument is frivolous for several reasons. First, respondents argued that the "on-the-person" exception to the statutory presumption was applicable to this case in their motion for a directed verdict at the close of the state's case. The trial judge expressly rejected this claim at that time, and consequently omitted any reference to that exception in his subsequent charge to the jury. For respondents to have reargued this issue again after the charge would have been purely redundant. The trial court "had been fairly presented" with that issue and had ruled on it. *Picard v. Connor, supra,* 404 U.S. at 275.

Moreover, the applicability of the "on-the-person" exception to this case is distinctly separate from the issue of the presumption's constitutionality. It was separately briefed and argued, both at trial and on appeal. Obviously, if the statutory presumption was unconstitutional, either facially or as applied in this case, then the jury could not constitutionally convict on the basis of the presumption. Consequently, the trial judge was obliged to dismiss the case at the conclusion of the state's presentation since no other proof of possession was offered. By allowing the case to go to the jury over respondents' objection, however, the trial judge incorrectly ruled that the presumption was facially constitutional and that it could constitutionally support a guilty verdict in this case. Respondents' failure to thereafter object to the judge's omission of the "on-the-person" exception in his charge to the jury was not a waiver of this issue, since even a properly instructed jury could not have rendered a constitutionally valid conviction.

Contrary to petitioners' assertions (petitioners' brief at 15-16), the New York Court of Appeals did not hold

that respondents had waived their right to challenge the constitutionality of the statutory presumption. Rather, that court implicitly reaffirmed its earlier decisions holding the provision constitutional by noting that this presumption was valid because of the difficulty of proving possession of guns found in automobiles and the importance of facilitating prosecutions for possession of such weapons (New York State Court of Appeals opinion, petitioners' appendix at 43a-45a). It was only as to respondents' separate claim—that as a matter of state law, the "on-the-person" exception to the statutory presumption was controlling here—that the court found waiver in respondents' failure to object to the incomplete charge.

This interpretation of the New York Court of Appeals decision, confirmed by the plain language of that decision[12] and the federal courts' interpretation of it, is also consistent with prior New York State decisional law on waiver. Since the question of the presumption's constitutionality was an issue of constitutional dimension, under New York law a contemporaneous objection was not necessary to preserve it for appellate review. *People v. McLucas,* 15 N.Y.2d 167, 256 N.Y.S.2d 799, 204 N.E.2d 846 (1965); *People v. DeRenzzio,* 19 N.Y.2d 45, 277 N.Y.S.2d 668, 224 N.E.2d 97 (1966); *People v. Arthur,* 22 N.Y.2d 325, 292 N.Y.S.2d 663, 239 N.E.2d 537 (1968); see also *United States ex rel. Schaedel v. Follette, supra,* 447 F.2d at 1300. The question of whether the "on-the-person" exception was applicable, however, could be viewed as predominantly an issue of state law, and therefore waived by the failure to object to the incomplete charge.

Consequently, petitioners are simply wrong in asser-

12. The New York Court of Appeals also stated that the issue which they regarded as waived was a "jury question." Since the constitutionality of a statutory presumption is not a jury question under any definition of that phrase, the Court was clearly not referring to that issue as the one which had been waived.

ting that the New York Court of Appeals held that the issue of this statute's constitutionality was waived in this case. Moreover, given respondents' repeated assertions of this claim both at trial and on appeal, there is no basis on which the Court could now find waiver.

B

Petitioners also argue that respondents waived their right to habeas corpus relief by failing to appeal the New York Court of Appeals decision directly to the Court under 28 U.S.C. §1257 (2) (Petitioners' brief at IIB). Petitioners cite no authority for this proposition, and seem to concede that it would constitute a new rule, substantially extending present exhaustion requirements. Obviously, the application of a totally novel procedural requirement would unjustly deprive respondents of the federal determination of their constitutional claims to which they are clearly entitled under the federal habeas corpus provisions. Moreover, the proposed rule is uniquely devoid of value or justification. The federalism interests underlying habeas corpus exhaustion requirements are fully vindicated when, as here, the state's highest court has passed on the issue. Similarly, the arguments of judicial economy upon which petitioners urge this rule are dubious; any savings to the lower courts would be at the expense of this Court's docket.

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, N.Y.
June 30, 1978

Respectfully submitted,

MICHAEL YOUNG
GOLDBERGER, FELDMAN & DUBIN
Attorneys for Respondents
401 Broadway, Suite 306
New York, N.Y. 10013
(212) 431-9380